SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 59

AGNES M. BANKS, WIDOW OF JOHN J. BANKS, DECEASED, AND REPRESENTATIVE OF JAMES M. BANKS, JANICE BANKS, AND CATHERINE M. BANKS, MINOR CHILDREN OF JOHN J. BANKS, DECEASED,
Petitioners,

AND

R. C. ENOS, DEPUTY COMMISSIONER,

vs.

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC. AND NEW AMSTERDAM CASUALTY COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS, CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., AND NEW AMSTERDAM CASUALTY COMPANY.

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REFERENCE TO REPORTS OF OPINION.

The opinion of the Court of Appeals is reported at 369 F. 2d 344 (C. A. 7).

STATEMENT OF JURISDICTIONAL GROUNDS.

Jurisdiction of this court is alleged to rest upon Title 28 USCA § 1254(1).

Section 1254(1) in its pertinent part provides that decisions of Courts of Appeal may be reviewed by the Supreme Court.

> "(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The judgment of the Court of Appeals was entered on July 13, 1966, rehearing denied on October 6, 1966. The parties were Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Co., plaintiffs-appellants, and R. C. Enos, Deputy Commissioner, defendant-appellee, represented by the U. S. Attorney as per statute. (33 U. S. C. 921(a).) None of these parties petitioned for a writ of certiorari at any time.

On January 3, 1967 a telegraphic application for an extension of time was filed by Agnes Banks. Time to file petition for writ of certiorari was extended by Mr. Justice Clark to March 5, 1967. A petition to intervene and a petition for writ of certiorari was filed within the time then allowed by the petitioners and both requests were subsequently granted by this court October 9, 1967.

It is respectfully submitted that the jurisdiction of the court rests upon the timely filing of a petition by a party before the court below. The petitioners here, although fully apprised (A. 105) of the filing of the action below, made no attempt to intervene at any time while the case was pending in the District Court or the Court of Appeals.

It is therefore respectfully submitted that the telegraphic request for extension of time was not made by a

party as required by law to invoke the jurisdiction of this court.

QUESTIONS PRESENTED FOR REVIEW.

1. Can an interested person who had official notice of appellate proceedings below and has failed to seek intervention as permitted by lower court rule seek an extension of time, intervene and thus become "a party" after the entry of final judgment by the Court of Appeals and thus qualify as a person entitled to request issuance of a writ of certiorari by the Supreme Court of the United States?

2. Does the doctrine of res judicata apply to the judicial determination of an issue of fact of past events made by an administrative body?

3. Is the acceptance of $19,000 after a $30,000 jury verdict in an action against a negligent third party a compromise of that action within the meaning of the term "compromise" in the Longshoremen's and Harbor Workers' Compensation Act and thereby a bar to a claim for compensation?

4. Does the record contain substantial evidence as required by statute to prove a relationship between the employee's work and fatal injuries sustained at home when the sole causal connection witness said both *yes*, there is a causal connection and *no*, there isn't, and otherwise contradicted himself?

STATUTES AND REGULATIONS INVOLVED.

In addition to Sections 921(a), 922 and 933(g) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 901 *et seq.*) as set forth on page 3 of petitioner's brief, the following statutes are involved:

Judiciary and Judicial Procedure, Supreme Court—

Jurisdiction, 62 Stat. 928, as Amended, provides the following pertinent provisions (22 U. S. C. 1254):

"SEC. 1254. *Court of Appeals; Certiorari; Appeal; Certified Questions.*

"Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1431, as Amended (33 U. S. C. 912):

"SEC. 912. *Notice of injury or death.*

"(a) Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury (1) to the deputy commissioner in the compensation district in which such injury occurred and (2) to the employer.

(b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.

(c) Notice shall be given to the deputy commissioner by delivering it to him or sending it by mail addressed to his office, and to the employer by delivering it to him or by sending it by mail addressed to him at his last known place of business. If the employer is a partnership, such notice may be given to any partner, or if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.

(d) Failure to give such notice shall not bar any claim under this chapter (1) if the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the

injury or death and the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (2) if the deputy commissioner excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death."

33 U. S. C. 923 of the Longshoremen's and Harbor Workers' Compensation Act, 64 Stat. 1271, as Amended, provides the following pertinent provisions:

"SEC. 923. *Procedure before the deputy commissioner.*

"(a) * * * Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury. * * *"

33 U. S. C. 924 of the Longshoremen's and Harbor Workers' Compensation Act, 63 Stat. 107, as Amended, provides the following pertinent provisions:

"SEC. 924. *Witnesses.*

"No person shall be required to attend as a witness in any proceeding before a deputy commissioner at a place outside of the State of his residence and more than one hundred miles from his place of residence, unless his lawful mileage and fee for one day's attendance shall be first paid or tendered to him; *but the testimony of any witness may be taken by deposition or interrogatories according to the rules of practice of the Federal district court for the judicial district in which the case is pending.* * * *" (Emphasis ours.)

33 U. S. C. 927 of the Longshoremen's and Harbor Workers' Compensation Act. 63 Stat. 107, as Amended, provides the following pertinent provisions:

"SEC. 927. *Powers of deputy commissioners.*

"(a) The deputy commissioner shall have power to preserve and enforce order during any such proceedings; to issue subpoenas for, to administer oaths to, and to compel the attendance and testimony of witnesses, or the production of books, papers, documents, and other evidence, *or the taking of depositions before any designated individual competent to administer oaths;* to examine witnesses; and to do all things conformable to law which may be necessary to enable him effectively to discharge the duties of his office." (Emphasis ours.)

33 U. S. C. 922 of the Longshoremen's and Harbor Workers' Compensation Act, as existing on March 4, 1927, 44 Stat. 1437, provides as follows:

"Upon his own initiative or upon application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time during the term of an award and after the compensation order in respect of such award has become final, review such order in accordance with the procedure prescribed in respect of claims in Sec. 19, and in accordance with such section issue a new compensation order which may terminate, continue, increase, or decrease such compensation. Such new order shall not affect any compensation paid under authority of the prior order."

33 U. S. C. 922 of the Longshoremen's and Harbor Workers' Compensation Act as existing on May 26, 1934, 48 Stat. 807, provides the following pertinent Amendments:

"Upon his own initiative *or upon the application of any party in interest on the ground of change in conditions or because of a mistake in determination of fact by the deputy commissioner, the deputy commissioner may at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, review a case* in accordance with the procedure prescribed in respect of claims in Section 19, * * *" (Emphasis ours.)

STATEMENT OF THE CASE.

Petitioner's statement of the case requires amplification because of its incomplete nature and because of certain inaccuracies.

Inaccuracies noted are as follows. Page 4, John Banks died on February 12 not on February 21. He fell not upon his arrival at home from work but some 20 to 25 minutes after arriving at home, opening some beer, visiting with his wife and James Whalen. There is no evidence to support the statements on page 5 that claimant was notified after the trial of a witness or that at the time of the first trial, Mike Miramontez was unknown to the claimant.

This action was commenced in the District Court for the Northern District of Illinois as an injunction proceeding to restrain the enforcement of an award in favor of petitioners made by Deputy Commissioner R. C. Enos under the Longshoreman's and Harbor Compensation Act.

The Deputy Commissioner had conducted two complete trials or hearings on the issue of whether fatal injuries suffered by John Banks in his home on January 30, 1961 were the result of an accidental injury that arose out of and in the course of his employment.

In the first trial, claim for compensation was denied. (A. 10, 11.) No appeal was taken. Thereafter, suit was brought in the Federal District Court by petitioners against the Norris Grain Company. A $30,000.00 verdict was returned. (A. 20.) $19,000.00 was subsequently accepted in lieu of a new trial. (A. 12.) A second trial was had before the Deputy Commissioner in August of 1963, which resulted in the award in favor of petitioners.

The Deputy Commissioner heard the following as evidence:

John J. Banks had worked as a grain trimmer since 1934

loading and unloading barges and vessels that carried grain. (A. 32.) He was a charter member of the Chicago Grain Trimmers Association and held stock in that company. (A. 79.)

On January 30, 1961 at approximately 4:45 P. M., John J. Banks was seen standing at the head of the basement stairs in his own home at 3520 East 112th Street, Chicago, Illinois. He suddenly came flying head first or like he was shot forward over all of the steps leading into the basement. He did not touch any step, you could have crawled under him. His hands were at his side, he did not cry out. The right side of his head struck the concrete floor causing injuries that resulted in death on February 12, 1961. (A. 32, 33, 79, 80.)

The first claim for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act was filed on February 20, 1961 and assigned number 46-71. It alleged that John J. Banks sustained an accidental injury at work on January 26, 1961 which caused him to fall at home on January 30, 1961 sustaining injuries which resulted in death on February 12, 1961. (A. 77, 78.)

The sole issue before the Commissioner was whether the fall at home which caused the death was a consequence of an injury which arose out of and in the course of the employment. (A. 78.)

Agnes M. Banks, the widow, testified that her husband came home from work on Thursday, the 26th of January, 1961 and told her that he had been hit by a cable that day and his head felt light. She didn't see anything unusual. (A. 78.) The same comment and complaint was made that evening. He asked for aspirin. He worked on Friday and on Saturday, was more quiet than usual and said he didn't feel good before he went to church on Sunday. He did not work his puzzles which was a normal activity on Sun-

day and on Monday morning asked that she not prepare any lunch for him. From January 26th to January 30th she noticed that she could not hold a real good conversation with him as if he was asked a question, he did not answer. She did not notice any pallor about him as his coloring was good. He seemed like he was depressed between January 26th and January 30th. (A. 78, 79, 80.) On Monday, January 30, he worked and came home about 4:00 P. M. Mr. Whalen said he and John Banks had left work at approximately 2:30 and had 3-4 beers in a tavern. A can of beer was opened for each at home. (A. 56.) After Mr. Whalen left, John Banks returned to the head of the stairs and asked to speak to his wife. He said no more but came right through the air like a shot and his head hit the pavement. He never touched the steps but his body stayed so high that you could have crawled under him. (A. 79, 80.)

Lawrence Banks, the President of the Chicago Grain Trimmers Association and brother of John Banks, testified he saw his brother on the 26th of January, 1961 and was told that as a cable had broken on a barge that day, they would have to finish it the next morning. John Banks also said to his brother that the cable had got him. He didn't notice anything unusual about his brother. On Friday morning he saw his brother and John Banks mentioned there was a tiny black speck on his forehead. He did not see him again until Monday morning when he said he was alright. (A. 90.)

Frank Costello, brother of Mrs. Banks and a Trustee of the Grain Trimmers Association, stated he had a conversation with John Banks on Thursday, January 26th. John Banks said he got hit by a cable but did not display any marks or bruises. (A. 91.) All other witnesses, including five other co-workers presented by the claimants and four presented by the respondent, testified that they did not see John Banks get hurt on the 26th and that when they

worked with him on either the 26th, 27th or the 30th, he made no complaint of ill-being. (A. 89, 90, 91, 92.)

Immediately after the accident at home, John Banks was admitted to South Chicago Hospital. He was attended by Dr. Koehler and Dr. Tinsley. (A. 80, 81.) The diagnosis was of alcoholism with cerebral vascular accident not surgical. (A. 87.)

Dr. Spiegel saw John Banks in the South Chicago Hospital once. He considered the possibility of a subdural hematoma. He found that the right upper extremity was paralyzed, the patient was confused and partially aphasic, that there was a history of an injury three days prior to the "cerebral vascular accident", and that three days before falling down the steps, he had been struck on the head by something heavy. Afterwards, he complained of cranial cerebral difficulty, headaches and other things.

Dr. Spiegel stated in answer to a hypothetical question that there might or could be a causal connection between the hypothetical patient's injury by a steel cable and his death. In giving this opinion he considered the nine findings reported by the Coroner's Physician. Also, that as the subdural hematoma progresses, it causes increasingly severe headache and that as it progresses, the symptoms of its presence increase. (A. 85.) That it was not the common thing for the man to pass out suddenly. Normally, it takes two weeks to three months to show symptoms. The acute subdural hematoma is a different phenomenon. It develops very suddenly with extensive bleeding and it kills in a matter of hours. (A. 86.) John Banks died on February 12, 1961.

Dr. Eric Oldberg was called by the employer and responded to a hypothetical question that even if it were assumed that John Banks was struck by a small piece of steel which penetrated the skin of the left temporal area

only, this could not account for the subsequent incident in his home which in turn caused his death. All nine findings contained in the Coroner's report were consistent with the severe trauma to right side of head sustained at home. (A. 85.)

Dr. Oldberg said it would be far beyond the realm of medical certainty for any tiny penetrating wound to have an inciting influence or etiological part in subsequent developments. Even if he had a severe blow to the head, it would be expected that other symptoms would appear, as a subdural hematoma is a slowly progressing thing. It acts much like a brain tumor as it progresses slowly, enlarges and causes pressure and the patient slowly becomes stuporous and develops neurological signs. A five day or a four day interval is very, very short to show symptoms. It could not take place within four days. It takes two weeks. (A. 87, 88.)

On June 8, 1961, the decision of Deputy Commissioner Enos was entered finding that John Banks did die as a result of injuries incurred in the fall at his home on January 30, 1961 but that all of the evidence failed to establish that this fall at home was the result of an injury that arose out of and in the course of his employment on January 26, 1961. (A. 8, 9, 10.)

The claim for compensation was rejected for the reason: "The death of the employee did not arise out of and in the course of his employment." (A. 8, 9, 10.)

On August 22, 1961, a second claim was filed under the Longshoremen's and Harbor Workers' Compensation Act alleging that John Banks sustained an accidental injury on January 30, 1961 which caused fatal injuries in his home on the same date resulting in death on February 12, 1961. (A. 20.)

On September 8, 1961, a libel in admiralty with jury

demanded was filed by Agnes Banks as administratrix of the estate of John J. Banks in the District Court for the Northern District of Illinois against the Norris Grain Company. It alleged that a rope broke and fell on John J. Banks on January 30, 1961 causing subsequent injury at home. $100,000 damages were requested. After argument, damages were limited to a maximum of $30,000. A jury verdict of $30,000 was returned on May 3, 1963. (A. 4, 5.) The defendant, Norris Grain Company, did not question the amount of the damages but moved the court for judgment for defendant notwithstanding the verdict or a new trial on a detailed specification of error. (A. 96, 97, 98, 99.) Judge Holland sitting in the Northern District of Illinois ordered that the motion for a new trial would stand granted unless the libelant within 10 days accepted a remittitur of $11,000. (A. 12.)

On May 17, 1963, Agnes Banks, Admin., as libelant moved the court that she accepted an $11,000 remittitur and requested judgment in the sum of $19,000. (A. 11.) A $19,000 judgment was entered and satisfied.

Thereafter, the employer and its insurance carrier filed a motion with the Deputy Commissioner alleging that the compromise of the District Court action without the employer's written approval barred the claim then pending. (A. 75, 76.)

Over objection, the second hearing proceeded on August 29, 1963. Michael Miramontez, a co-worker of the decedent, said a rope broke and a whole pile of it came on top of the head of John Banks. (A. 24.) The rope had been stretched almost vertically a distance of approximately 50 feet from the hold in a barge to a tower adjacent to the grain elevator. He did not see the rope fall but when he looked at John Banks he was leaning forward with his hands on a hatch cover. The rope was still on his head

and it was coiled up in a tight ball. (A. 26, 27.) Michael McAndrews also worked with John Banks on January 30, 1961. At 2:00 P.M. that day, he heard a cracking sound and looked up and saw rope on top of John Banks. He figured it weighed 25 or 30 pounds. When he saw the rope, it was coiled all over the body of John Banks but wouldn't say the whole works was on top of his head, but a whole lot of it was. The incident described occurred in the Fall of the year. (A. 28, 29.)

The employer presented the testimony of Mr. Olster who worked the same rope that John Banks had that day and he said he could not recall any rope breaking or any rope hitting John Banks. (A. 66.) Other witnesses denied knowledge of the rope breaking or that John Banks made any complaint, even after work, when in a tavern. (A. 69, 70, 71.) Time records established the job was finished between 2:30 and 2:45 P.M. (A. 70.) An employee of the grain elevator said they had no record to show whether or not a rope broke. (A. 71.)

Mrs. Banks testified that her husband came home about 4:30 in the afternoon on January 30, 1961. He was sober. Mr. Whalen was with him. After Mr. Whalen left, John Banks came to the head of the stairs and said he wanted to say something. He stood straight up and then pitched forward. He came through the air without ever touching the stairs with his arms at his side. He never hit the stairs on the way down. (A. 32, 33.) Mrs. Banks stated on cross-examination that when she previously testified before the Commissioner, she reported that her husband had complained of a headache and had taken aspirin in the days preceding January 30, 1961; that he did not want his lunch made for him on Monday morning (A. 34); that when her husband fell down the steps, he never touched any of the steps prior to striking the concrete floor below. (A. 35.) Also, that although none of the grain trimmers

mentioned the rope incident to her at the time of her husband's wake, her son did tell her very shortly after the funeral that John Banks had said to him on January 30th that he got hurt at work that day. The entire matter had been gone over with her attorney before the first trial but Mrs. Banks said she did not mention it to the commissioner when she testified before him in June of 1961. (A. 36, 37.)

Dr. I. Joshua Spiegel was called as a medical expert by the claimant. He had previously testified in the first trial and in the third party action in the District Court. He saw John Banks on one occasion on February 1, 1961 in South Chicago Community Hospital and found that the right side was paralyzed, he was aphasic, he could not speak and a spinal puncture revealed that the spinal fluid was grossly bloody. (A. 40.)

In answer to a hypothetical question which included the rope falling incident and the nine points found in the Coroner's report and other evidence, Dr. Spiegel stated that it was his opinion that the blow from the mass of rope caused him to lose consciousness before he fell from the top of the steps. The reasons were the fact that the man was unconscious when he fell, he was standing, he wasn't moving, that one cannot slip or trip unless he moves. (A. 44, 45.) The doctor was of the opinion that the man had an acute subdural hematoma. On cross-examination he stated that he had previously said under the same hypothetical situation that it was a chronic subdural hematoma. (A. 45.) He also said that he had assumed that the man fell from a standing position onto the steps below. On questioning by the Deputy Commissioner, the doctor stated that it was absolutely impossible for the man to have become unconscious and then pitch over all the steps to the floor below because it was simply too great a distance. It was his opinion that he would necessarily have had to take a good running start to do that or have gone into severe

contractures due to special types of poison or other diseases to accomplish that broad a jump. (A. 54, 55.) Also, that it was true that when a man becomes unconscious from a subdural hematoma, he will slump to the floor and if he were standing at the head of a stairway, he would tumble down the stairs onto the steps themselves. (A. 55.)

Dr. Eric Oldberg was called by the employer. A hypothetical question was presented incorporating all medical facts including the nine findings of the Coroner and the evidence that a quantity of rope fell onto the head of John Banks. (A. 59.) The doctor gave his opinion that he could see no connection between the rope falling incident and the trauma at home two to two and one-half hours later. (A. 62.) The reasons for the opinion were that the hypothetical question contained no facts, medical or otherwise, that would connect anything that could have happened two hours before that would cause a sudden catastrophic thing that precipitated the man down a flight of stairs. There was no known mechanism of the brain which could account for it. If there had been brain damage or anything about the brain affected as a result of the rope falling, then there would have been a march of events ending in unconsciousness. But on reasonable medical grounds, there is no way of explaining an instantaneous unconscious state to precipitate the man down the steps. To the doctor, it just did not happen that way and there could be no connection from a medical standpoint. (A. 62, 63.) It could happen with other types of attacks but it could not be connected with rope collapsing on the man's head. All of the findings of the Coroner's physician were considered in giving the opinion. (A. 63.)

Dr. Oldberg said it was his opinion the massive subdural hematoma was entirely the result of the fall down the stairs. (A. 65.)

The Deputy Commissioner entered findings of fact and an award on January 27, 1964 granting $54.00 per week to petitioners indefinitely according to the provisions of the Act. (A. 13, 14, 15.) The District Court affirmed the award. (A. 103.) The Court of Appeals (C. A. 7) reversed on the ground that the second proceeding was barred by the application of res judicata. (A. 104.)

SUMMARY OF ARGUMENT.

The respondents believe that the Court of Appeals correctly applied the doctrine of res judicata for the reason that the determination in the first hearing is conclusive as to all issues actually tried and litigated as well as those which might have been presented. The parties were identical and the issue was identical, that of whether the fatal injuries at home were related to decedent's employment. There was but a single cause of action and it was incumbent upon the petitioners to present all aspects of the cause or all specifications of alleged contributing cause to the one fatal fall at home in a single trial. Parties are not permitted to withhold an alternative theory for a second trial.

To the suggestion that Section 22 of the Compensation Act permits the reopening of a claim for mistake or change in condition, the respondents reply that the second claim of petitioners was not in the nature of a modification petition and was never considered as such until the decision below issued. That section is applicable only to a mistake or change in condition relative to the physical condition or extent of disability of the employee and is not applicable to retry basic issues of jurisdiction or liability.

The Longshoremen's and Harbor Workers' Compensation Act provides that the compromise of an action against a negligent third party by an employee or his dependent

without the written approval of the employer is a bar to a claim for compensation. Here, the petitioners filed a negligence action against a third party, a $30,000 jury verdict was returned and the dependents then agreed to accept a $19,000 judgment. Respondents contend that the acceptance of the $19,000 judgment was a compromise of the third party claim and for the reason that it was not approved in writing by the employer, it bars the compensation claim. To petitioners' argument that the $19,000 judgment was the result of a remittitur and, therefore, a judicial determination of damages, the respondents reply that the record is clear that on the motion for retrial that preceded the order of remittitur, the issue of damages was not before the court, the court did not and could not have evaluated the damages and, therefore, the remittitur is in the form of a consent judgment which qualifies as a compromise to bar the compensation claim.

Respondents also contend that the finding of a causal connection between the decendent's work and the fatal fall at home is a finding of fact without substantial foundation in the evidence as is required by law.

The review of the case in the District Court was accomplished without oral argument and the Court of Appeals did not reach the issue of the substantiality of the evidence because of the application of the doctrine of res judicata. Therefore, there has not been adequate judicial review of that issue. Because this court has stated that the Congress has imposed upon the courts the responsibility for assuring that the administrative board keeps within reasonable grounds, respondents feel the weight of the evidence must be reviewed as it fails to meet the minimum requirement of being substantial as defined by this court.

The bridge of causal connection between the work and the fatal fall at home is such that it cannot be constructed without the use of expert medical testimony. The only expert who testified said it was impossible to have resulted from any physical condition that might be related to a work trauma.

ARGUMENT.

A. THE FACTS OF THIS CASE REQUIRE THE APPLICATION OF THE DOCTRINE OF RES JUDICATA.

1. Section 22 Does Not Modify the Doctrine of Res Judicata in Its Application to the Determination of an Issue of Past Fact Regarding Basic Liability.

The petitioners' main legal contention now appears to be that although the doctrine of res judicata does or at least may apply to findings of an administrative body, Section 22 of the Longshoremen's and Harbor Workers' Compensation Act creates a special exception to the doctrine. It is now alleged that the second claim filed by petitioners was a Section 22 (33 U. S. C. 922) petition founded on the theory that the Commissioner had made a mistake of fact in the first decision. This is a new contention. It was not made known when the second claim was filed in August of 1961, although respondents answered that second claim (A. 101) and controverted (A. 102) it on the ground that the issues were barred by res judicata. No suggestion was made that the claim was intended as a modification claim based on mistake. In September, 1961, at the prehearing before the Deputy Commissioner, neither petitioners nor the Deputy Commissioner mentioned or considered the claim to be a Section 22 petition. (A. 4.) When the trial commenced on the second claim in October, 1963 (A. 19) res judicata was again alleged, but no one suggested Section 22 as being involved. (A. 19, 20.) On appeal to the District Court it was not suggested that the second claim was in the nature of a Section 22 petition nor was that contention urged in original briefs filed in the Court of Appeals. It was not until the petition in the

Court of Appeals for re-hearing that petitioners decided to call the second claim a Section 22 petition and then only because the Court of Appeals in its completeness had stated that Section 22 could not apply. (A. 115.)

It is not contended by respondents that an employee must precisely label a pleading before the Commission. However, the failure of the parties or the Deputy Commissioner to urge or even discuss the claim as a Section 22 petition is an indication that the nature of the petition as a new claim was recognized by the Commissioner as well as by the parties and their counsel as not within the purview of Section 22 concerning mistake or change of condition relating to disability. The Deputy Commissioner permitted the second claim to proceed because a different date was alleged. (A. 21.) The attitude of all parties correctly acknowledges that Section 22 was not applicable as it could apply only to a claim to modify because of a mistake or a change in condition regarding the employee's degree of disability or physical condition. The legislative history of the section and case decisions demonstrate no broader purpose.

Section 21 alone provides the means to review the fundamental issues of jurisdiction and liability, the finality of which is essential to give certainty to the remedial purpose of the statute. Section 22 was enacted and developed only to provide an effective means by which the Commissioner could fulfill his duty to exercise continuing jurisdiction over the extent of the physical disability of the employee.

In the first Act of July, 1927, Section 22 provided for modification only upon "a change in conditions during the term of an award", and the Commissioner could terminate, continue, increase or decrease compensation. (33 U. S. C. 922, 1927.) The first report of the Commission to the Congress on administration of the Act recommended

a broader reopening provision[1] for the reason there was no provision in either Section 22 or Section 21 to handle the situations which continually arose where the Commissioner sought to correct an error in an order. The type of error is not described, but by comparing the Longshoremen's and Harbor Workers' Compensation Act with antecedent state compensation laws, it may be concluded that the "error" referred to in the recommendation was a clerical error, such as a mistake in computation, designation of the parties or other clerical errors. Many states have provisions to correct that type of error.[2]

There is no provision in the Longshoremen's and Harbor Workers' Compensation Act to modify simple administrative or clerical errors. The 1928 Commission report did recommend that the Deputy Commissioners be given the continuing authority to reopen cases that is usually conferred upon compensation boards. The reopening authority of compensation boards generally is described in Larson's Workmen's Compensation Law, Vol. II at Page 330:

> "This provision is a recognition of the obvious fact that, no matter how competent a Commission's diagnosis of claimant's condition and earning prospects at the time of hearing may be, that condition may later change markedly for the worse, or may improve, or may even clear up altogether. Under the typical award in the form of periodic payments during a specified maximum period or during disability, the objectives of the legislation are best accomplished if the Commis-

1. 12th Annual Report, U. S. Employees' Compensation Commission, 70th Congress, 2nd Session, House Document No. 379, pages 39-40.

2. Ill. Rev. Stat. Ch. 48 § 138.19(f) providing that a decision shall be conclusive, however, the Commission or on motion of either party may correct any clerical error or errors in computation within 15 days after the date of the receipt of the award. In Illinois modification on reopening is permitted only upon change in condition, Ch. 48 Ill. Rev. Stat. §138.19(h).

sion can increase, decrease, revive or terminate payments to correspond to claimant's changed condition. * * *"

The author further stated in § 81.32 at P. 333 when discussing the issues that are relevant in reopening that:

"In a reopening proceeding, the issue before the board is sharply restricted to the question of extent of improvement or worsening of the injury on which the original award was based. If the original award held that there was no connection between the accident and claimant's permanent disability, there is nothing to reopen, and claimant cannot retry the issue of work-connection through the device of a reopening petition. Conversely, when the employee reopens to show increased disability, the insurance carrier cannot raise the basic issue of liability. * * *"

In 1928 in *F. Jarka Co., Inc. et al.* v. *P. J. Monahan,* 29 F. 2d 741 (1928), the court refused to permit the reopening of a claim for additional compensation because the application was made after the expiration of the term of the award. In 1930 the Commissioner's report to the Congress[3] advised that the modification authority "during the term of an award" is not sufficient in the interest of justice and asked for an amendment permitting the reopening at any time.

The May 26, 1934 amendment provided for modification because of "change in condition or because of a mistake in a determination of fact by the Deputy Commissioner". Such modification was permitted "at any time prior to 1 year after the date of the last payment of compensation whether or not a compensation order has been issued". Authority granted by the amendment was to "terminate, continue, reinstate, increase or decrease such compensa-

3. 14th Annual Report, U. S. Employees' Compensation Commission, 71st Congress, 3rd Session, House Document No. 552,

tion''. (33 U. S. C. § 922, 48 Stat. 807.) In the year of the amendment, 1934, the Commission advised Congress[4] that the amendment of Section 22 was not yet complete as there was no provision for reopening or modification where there had been no payment of compensation or when a claim for compensation had been rejected. It was suggested that a reopening be permitted within 1 year after the rejection of a claim in order that all cases would receive equal application of Section 22.

The reference to a rejection of a claim did not mean a finding by the Commissioner of no jurisdiction or no liability because of failure to prove an accidental injury that arose out of and in the course of the employment. The rejection of a claim meant only a finding that no benefits were due at the time of the order. This is obviously a recognition of the fact that in most compensation cases, the employer either immediately commences the payment of compensation after the occurrence, as is his obligation under the statute (33 U. S. C. 914), or reports the occurrence of a compensable accident to the Deputy Commissioner but suggests that no compensation is due, that is, there is no disability for which compensation is payable. In either circumstance, there may be a hearing after which the Deputy Commissioner could reject the claim, not because there is no liability, but because there is no disability and, therefore, no compensation is due at that time.

That the term ''rejection'' of a claim means denial of benefits as of the time of the order even though liability is established appears in *Case* v. *Calbeck*, 304 F. 2d 198 (1962) where the Deputy Commissioner entered an order ''reject-

4. 18th Annual Report, U. S. Employees' Compensation Commission, page 38.

ing'' the claim even though there had previously been a finding in an earlier hearing that an accidental injury had occurred and that certain compensation was due. The development of a neurosis was claimed. It is thus seen that the terminology ''rejection of a claim'' in Section 22 does not refer to the basic liability issue of accident or work connection, but to whether the physical condition resulting constitutes a disability for which compensation is payable.

On June 7, 1938, Section 22 was amended to permit the filing of a claim for modification within 1 year after date of last payment or within 1 year after the rejection of a claim. (33 U. S. C. 922, 52 Stat. 1167, 1938.)

While the courts have expanded the authority to review for mistake beyond the mistakes of a clerical nature, the decisions are not uniform in defining the extent or outer limits of the Deputy Commissioners' authority in reviewing for mistakes with the single exception that such review is confined to a mistake as to the physical condition or condition of disability of the employee. It has been held that on a petition to reopen because of a mistake, the Deputy Commissioner is restricted to a review of the evidence previously presented to ascertain whether it was properly evaluated. *Texas Employers Ins. Ass'n* v. *Sheppeard*, 42 F. Supp. 669, the court said at page 671 referring to the Deputy Commissioner:

> ''* * * He considered and gave the fullest effect to all of the evidence, finally making an award which exhibited a full understanding an appreciation of the evidence and of its effect. * * * The statute does not say, it does not mean, that a compensation proceeding be reopened whenever a party finds a witness who can testify more favorably for him than his other witnesses had done. * * *''

It has nonetheless frequently been held that the Deputy Commissioner in a proceeding to reopen on the ground of mistake is not confined to the prior record, nor is he confined to newly discovered evidence in a Section 22 petition. *Clyde-Mallory Lines* v. *Cardillo,* 22 F. Supp. 40, 41 (1938); *Stansfield* v. *Lykes Brothers,* 124 F. 2d 999 (1942); *Tuddman* v.. *American Ship Building Co.,* 170 F. 2d 842, 844 (C. A. 7 1948). Significant in each of the above cited cases is the fact that, whether the court considered the Deputy Commissioner confined to the prior record or whether additional evidence, newly discovered or not, was considered, in each case the evidence issue pertained only to the degree of disability or physical condition of the employee. The term "change of condition" in Section 22 of the Act means a change in the employee's physical condition and not other conditions. *Burley Welding Works* v. *Lawson,* 141 F. 2d 964, 966; *Pillsbury* v. *Alaska Packers Association,* C. A. 9, 85 F. 2d 758, 760 (1936); *Bay Ridge Operating Co.* v. *Lowe,* 14 F. Supp. 280, 281 (S. D. N. Y. 1936).

The traditional purpose and use of Section 22 has been to re-evaluate the physical condition to determine disability of the employee. In *Pillsbury* v. *Alaska Packers Association,* 85 F. 2d 758 (C. A. 9 1936), a final decision was entered finding relationship of employer-employee, accident and related disability. On a petition by the employee for additional compensation for increased disability, the employer sought to relitigate the issue of the employer-employee relationship. The court held that issue had become final as the finding had not been appealed in accordance with Section 21 and the issue could not be reopened in a Section 22 modification hearing. The court said at P. 761 that:

> "In view of that provision and particularly under the record made out in this case, to permit the jurisdictional fact of employment to be questioned 20 months after the original compensation order would, we think,

result in frittering away the purpose of the Longshoremen's and Harbor Workers' Compensation Act. (See also *United Fruit Co.* v. *Pillsbury* (D. C. 55 F. 2d 369, 370)."

There is no evidence in the statutory history or the decisions interpreting Section 22 that it is intended to permit a review within 1 year of anything other than the physical condition and related disability of the employee. Any other interpretation of the purpose of this section would result in harsh, incongruous, if not absurd, results. In *Sanderson* v. *Crucible Steel Corp.*, 66 A. 2d 188 (N. J. 1949), the Commission initially established that the accidental injury had aggravated the employee's condition of multiple sclerosis so as to cause disability. At a subsequent hearing, when the employee sought increased disability because of the advancement of his condition, the court refused to permit the employer to relitigate the issue of whether the disease had been aggravated by the trauma in the first instance. The finding that an alleged condition has no connection with the employment is final if not directly appealed and cannot be reconsidered on a petition to reopen. *Ross* v. *State Industrial Court*, 394 P. 2d 501 (Okla. 1964); *F. K. Kelter* v. *Hanks*, 234 P. 2d 623 (1951); *Weymer* v. *Industrial Commission*, 88 N. E. 2d 841, 404 Ill. 271, 275 (1949).

The suggestion of the petitioners here that the basic liability issue can be relitigated under the guise of a Section 22 mistake or change of condition petition suggests that even as applied to this case, if compensation is once paid, the employer can thereafter relitigate that liability issue simply by suggesting mistake and by bringing forth some evidence. In this case it might be suggested that there was more than 3 to 4 beers in the tavern before the deceased fell at home. If that is not successful, it could be suggested that a new witness has come forward that knew

of a defective condition of the top step in the Banks' home or that the children's roller skates were normally kept there. Such interminable litigation would hardly effectuate the remedial purpose of this statute. More harsh and incongruous is the effect of the position urged by the petitioners here when it is considered that at the close of the 1966 fiscal year, payments were being made on over 1,000 death awards.[5] In each of those cases the issue is now closed as to whether or not the death of the employee was the result of an accidental injury that arose out of and in the course of his employment. Petitioners here ask this court to so interpret Section 22 that the basic liability issue may be challenged at any time in each open case. That construction would also subject the even more numerous open, non fatal, disability cases to retrial of the liability issue as was attempted in *Alaska Packers and Crucible Steel, ante.*

Considering the statute as a whole, it is apparent that Section 21 (33 U. S. C. 921) is intended to afford all parties a judicial review of all jurisdictional and liability issues by appeal to the District Court within 30 days from the decision of the Commission. If no such appeal is taken, the basic findings become final, subject only to the continuing administrative control vested in the Deputy Commissioner to do justice to the parties by regulating the amount or degree of benefits in accordance with the employee's physical condition or disability. To extend the authority of Section 22 beyond continuing supervision of the disability of the employee as related to his physical condition ignores the structure of the Act as it negates the purpose of the 30 day appeal clause to achieve finality on the issues of jurisdiction and liability.

In Section A-1 of the argument portion of petitioner's

5. Donald Kress, Chief Statistician, Bureau of Employees' Compensation, U. S. Department of Labor, Washington, D. C.

brief, various comments are made with reference to time of filing. The respondents make no specific reply here for the reason that the respondents have never contended nor does the opinion of the court below rest upon any belief or suggestion that 1) a modification petition must be filed in 30 days or 2) that it must be heard within 1 year or 3) that a decision must issue within 1 year. Also, there is no dispute that a proper Section 22 petition may be filed within 1 year from the alleged occurrence or 1 year from the date of the last payment of compensation. The cases cited on page 14 do not support the implication made there by petitioners' brief that Section 22 was intended to prevent application of the doctrine of res judicata. Each case cited deals with the evaluation of disability in a second proceeding after a final determination of liability in a prior proceeding. Each case deals with the question of whether the physical condition justifies that compensation be granted, increased, diminished or in some other manner modified. Not one case cited by petitioners deals with the basic liability issue of accident or work connection between accident and disability or death.

2. The Facts Show a Single Cause of Action. The Actions and Parties Being the Same, the June 8, 1961 Decision of the Deputy Commissioner Is Res Judicata to All Matters Decided and Also to Those Which Might Have Been Decided.

At the commencement of the first trial before the Deputy Commissioner in May, 1961, he recited that it was alleged that the decedent fell down the basement stairs on January 30, 1961 and sustained injuries which caused his death on February 12, 1961. He stated the sole issue was whether the fall which caused the death was a consequence of an injury which arose out of and in the course of employment. (A. 78.) The decision following that trial stated:

"1. The death of the employee did not arise out of and in the course of his employment." (A. 10.)

The second claim also sought benefits under the same compensation statute because of the death of John Banks which death was caused by injuries sustained in his home. The distinction in the two claims is that in the first a single trauma of January 26, 1961 was alleged while in the second a single trauma of January 30, 1961 was alleged. It is here argued by the petitioners that the separate incidents alleged each gave rise to a separate and distinct cause of action against the one employer for the reason that each, either singularly or in combination, was responsible for the subsequent severe traumatic episode in the employee's home.

To hold that each such possible element or factor in an alleged chain of causation constitutes a separate cause of action for a single ultimate damage or loss would be to permit a claimant or plaintiff to subject his opponent to the harassment and vexation of a multiplicity of suits.

In any personal injury action, there are usually multiple specifications of negligence or fault creating a legal liability for a resulting damage. This is also true in compensation proceedings wherein a series of traumatic episodes, strains or other incidents may each contribute to the ultimate appearance of a ruptured disc, hernia or other disabling condition. These specifications may range over many years and include such widely divergent acts or omissions as improper design or construction, faulty supervision of equipment or personnel, failure to warn and actual wilfull and overt aggression.

It has been the announced policy of our system of jurisprudence and it has been the whole tenor of the decisions of this court to require a plaintiff to try his whole cause of action and his whole case at one time. *U. S.* v. *California & Oregon Land Co.*, 192 U. S. 355 (1903).

The principle of res judicata was recently defined in the case of *Engelhardt* v. *Bell & Howell*, C. A. 8, 327 F. 2d 30 (1964), where it was said at page 32:

> "[1] The law of res judicata as it relates to claim preclusion is firmly established. In the subsequent action by the same parties, a judgment on the merits in a former action based upon the same cause of action precludes relief on the grounds of res judicata. The judgment is conclusive not only as to matters which were decided, but also as to all matters which might have been decided."

Petitioners cite *Commissioner* v. *Sunnen*, 333 U. S. 591, 597 (1947). Respondents can accept the general definition of res judicata quoted as being in full support of the ruling below. Petitioners' reference to a modification of the general principles when a second cause of action exists is not applicable here where but a single cause exists. The fact that 2 separate dates were alleged and that was the only reason the Commissioner permitted the second trial does not create a second cause of action any more than excessive speed and faulty brakes preceding an auto collision creates two separate causes of action for damages.

This court has set forth the applicable rule in *Baltimore SS Co.* v. *Phillips*, 274 U. S. 316 (1927) which was substantially relied upon by the court below when it quoted from that opinion as follows:

> "* * * Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.
>
> "A cause of action does not consist of facts, but of

> the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. 'The *thing*, therefore, which in contemplation of law as its *cause*, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*' " *Ibid.*

Because of the existence of but a single cause of action with identical parties, it was incumbent upon the claimants to assert in one claim all the incidents of employment which singularly or in combination were alleged to have caused the fall in the home. (A. 114.) Petitioners have not specifically challenged the authority of *Baltimore SS Co.* v. *Phillips* nor have they specifically responded to the application of the principles there announced to this case.

Petitioners also apparently agree with the pronouncement of the court below that the doctrine of res judicata is applicable to administrative determinations and that the doctrine should be applied in full force to some administrative action and such is the case when the issue is an adjudication of past facts. The court below we believe has correctly held that in this case an adjudication of past events was required and the claims as to ultimate issues were identical. (A. 116.)

The respondents suggest that the cited case of *Ash Sheep Co.* v. *U. S.*, 252 U. S. 159 (1919) is not contrary to the opinion of the court below as the facts of this case do not involve a situation where any question was presented in

the second action which could not have been determined in the first. The same response is applicable to *Reynolds* v. *Stockton,* 140 U. S. 254 (1891) as the pleadings in both claims filed with the Deputy Commissioner raised the single ultimate issue as to whether the fatal injuries sustained at home were the result of an accidental injury arising out of and in the course of the employment of the decedent. The decision below also is in no way in conflict with this court's opinion in *Sherrer* v. *Sherrer,* 334 U. S. 343 (1947). It is agreed that questions of jurisdiction are not exempt from the application of res judicata.

Both points A-1 and A-2 of the argument commence by complaining that the procedures at the Commission deprive them of an opportunity to become fully informed and that sometimes petitioners appear pro se and, therefore, res judicata should not apply.

The first Complaint regarding the absence of discovery procedures is incorrect as Section 24 of the Longshoremen's and Harbor Workers' Compensation Act specifically provides:

> "* * * the testimony of any witness may be taken by deposition or interrogatories according to the rules of practice of the Federal District Court for the judicial district in which the case is pending * * *". (33 U. S. C. 924.)

This record also discloses that on September 21, 1961 the petitioners requested an indefinite postponement of the second trial and thereafter took depositions and filed interrogatories in connection with the District Court action. That same procedure was available initially.

Section 27 of the Longshoremen's and Harbor Workers' Compensation Act provides that the Deputy Commissioner shall have the power among other things to compel the attendance and testimony of witnesses, the production of

books, papers and documents and "the taking of depositions before any designated individual competent to administer oaths." (33 U.S.C. 927.)

Petitioners' excuse for withholding their knowledge of an alleged accident on January 30 is that they did not know of an eye witness. This is likewise without substance as petitioners in the first trial utilized Section 33 of the Compensation Act which permits the introduction of declarations of a deceased person even to the parties interested in the litigation. Section 33 provides in part that:

> "Declarations of a deceased person concerning the injury in respect of which the investigation or injury is being made or the hearing being conducted shall be received into evidence and shall if corroborated by other evidence, be sufficient to establish the injury." (33 U.S.C. 923.)

In the first trial Mrs. Banks (A. 78), her brother, Frank Costello (A. 91) and Lawrence Banks, brother of decedent (A. 90) each testified by utilization of Section 23.

The procedure, therefore, affords the same discovery advantage as in the District Court and substantially liberalizes the rules of evidence to the advantage, not the detriment, of the compensation petitioner. Strict application of the doctrine of res judicata is required when it is considered that the circumstances surrounding the fatal injuries of John Banks in his own home are details particularly within the special knowledge and the control of the petitioners. The petitioners' advantage is compounded by the fact of their close association, if not control, of all of the circumstances surrounding the personnel and activities of the Chicago Grain Trimmers Association, Inc.

On page 19 petitioners cite the Restatement to the effect that fraud or misrepresentation which prevents the plaintiff from including the entire claim in the original action would

prevent the application of the doctrine of res judicata. Petitioners offer no authorities or definitions or even factual argument to support the prejudicial innuendo.

The suggestion that the carrier withheld information because the April 4, 1961, interview with Mike Miramontez was not reported to the Commission completely fails to take into account that knowledge of this interview was in the possession of the carrier only in the form of a memo. Also that the memo advised the carrier that Miramontez had referred to a rope falling incident on January 30; that the incident had been completely checked out and was totally uncorroborated by any other person at that job site that day and further, it allegedly occurred at a time shown to be long after all men had left the site and, therefore, in the opinion of the investigator, was an afterthought. Subsequent testimony by Mike Miramontez showed that he said he had worked with John Banks the entire day of his rope falling incident. The records of the company and the testimony of other witnesses show that John Banks worked at an entirely different location from Mike Miramontez on the morning of January 30, 1961. The witness again repeated that he thought the incident occurred after 2 o'clock; that it took some time near a half hour to repair the rope and the men then worked for another 2 hours. This positively could not have been January 30, 1961.

Under those circumstances the filing of a notice of an accident would be more of a misrepresentation than a compliance with the Act.

The question of notice however is not without significance in this case. If the petitioners contend that an accidental injury did occur on January 30, the first burden was with the petitioners to file a written report with the employer and with the Deputy Commissioner as is provided by Section 12 of the Act. (33 U. S. C. 912.) Petitioners here

contend that they had information that John Banks was injured on January 30 at work. Mrs. Banks discussed it with her son in mid February (A. 36); she went over the entire matter involved with her attorney prior to the filing of the claim on February 21, 1961, and also went over the matter with her brother, Frank Costello, and with her brother-in-law, Lawrence Banks. (A. 36, 37.) Not only did the petitioners fail to file the written notices required by statute, Mrs. Banks, Lawrence Banks, and Frank Costello, each testified on behalf of petitioners at the first trial and each failed to give notice orally or in writing at that time but concealed the alleged information which they now contend is a basis for a valid claim.

If the petitioners had complied with the statute and given written notice of the alleged rope fall of January 30, the carrier would have been compelled to file within 10 days an answer to the claim as they did after the second claim was actually filed (A. 110), and thereafter would have been required to file Form U. S. 207, a statement that the claim would be controverted setting forth the reasons for controverting the claim. (A. 102.)

The failure to give notice as required may be excused by the Deputy Commissioner and the compensation order in this case recites that the failure to give notice did not prejudice the employer. Such prejudice may be presumed if the employer had knowledge, but that knowledge must exist within 30 days of the alleged accident. *Bethlehem Steel Co.* v. *Parker,* D. C. Md., 63 F. 2d 334 (1947). Here the equivocal interview with Mike Miramontez was held on April 4. The Commissioner's finding that the failure to give notice was excused does not meet the test that some satisfactory reason must be given for so excusing the failure. *Voris* v. *Eikel,* 346 U. S. 328 (1953). Rather, the failure of the petitioners to give notice requires the rejection of the claim. *Oljenik* v. *O'Hearne,* D. C. Md., 135 F.

Supp. (1955); *McTaggart* v. *Lowe;* D. C. N. J., 69 F. Supp. 101 (1946).

The extensive citation by petitioners of *Stansfield* v. *Lykes Brothers S. S. Co.*, C. A. 5, 124 F. 2d 999 (1942), does not go to the issue of res judicata. The only issue there was the physical disability of the employee in a Section 22 modification hearing. The Court acknowledged that consideration of facts previously known to the employee was an exceptional extension of the scope of a Sec. 22 petition. The Court justified the extension by pointing out the first hearing was not final in any sense as it was by stipulation which is a practice prohibited by the Act. The case does not provide authority to justify the withholding of alleged pertinent information by Mrs. Banks prior to the first trial, particularly when all of the circumstances were reviewed with her lawyer prior to that first trial.

B. TO LABEL A COMPROMISE A REMITTITUR DOES NOT MAKE IT A JUDICIAL DETERMINATION.

There is apparent agreement among the parties before this court that if the acceptance of $19,000 in final disposition of the claim of Agnes Banks against the Norris Grain Company after a $30,000 verdict was a "compromise" of that claim, then the compensation claim is barred by the terms and provisions of Section 33(g) (33 U. S. C. 933(g)).

Section 33(g) provides in part as follows:

> "(g) If a compromise which such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall become liable for compensation as determined in subdivision (f) of this section *only if such compromise is made with his written approval.*" (Emphasis ours.)

There is no dispute that petitioner accepted $19,000 after a $30,000 verdict and executed a final release to the Norris Grain Company without the written approval of the employer. The chronology of events leading to the acceptance of the $19,000 is that on May 30, 1963 a jury returned a verdict of $30,000. The defendant, Norris Grain Company, moved for judgment in accordance with motion for directed verdict or for a new trial. (A. 96.) The motion specified 9 paragraphs of error plus subparagraphs not one of which questioned the propriety of the amount of damages or requested that the court evaluate or ascertain the fair or maximum damage. The petitioners here nonetheless argue that damages were judicially determined solely because an order of remittitur with written acceptance by plaintiff was used to terminate the pending case.

Similar attempts to avoid the clear provision of the statute have been thwarted by the New York Courts by simply recognizing the true nature of the court order used to effect a compromise. In *Bogdanoff* v. *Halper,* 52 N. Y. S. 2d 625 (1944) the court entered a directed verdict during the course of the trial after negotiations between the parties. The directed verdict was recognized as nothing more than a means of effecting the compromise as was the remittitur order here. In that case the court said at page 626:

> "(1) I take it to be elementary that a trial justice cannot, on the trial of a negligence action, direct a verdict for the plaintiff for a specific sum without the assent of the defendant. If there is assent then there is a compromise, in every substantial sense of the term. The judgment entered thereon is merely the means used to render the compromise effectual. Obviously the defendants in claimant's case admitted liability in an amount certain, and the action of the judge and jury relative thereto was merely pro forma. If an impregnable barrier of sanctity is to bar an attack upon a judgment of that character, which in sub-

stance is a judgment by confession, then a very easy and effectual method has been found to circumvent the requirements of Section 29 of the Workmen's Compensation Law. That section requires the written consent of the carrier and employer to any settlement before the claimant may thereafter ask the Industrial Board to consider a claim for deficiency compensation."

"* * * I regard the direction of a verdict for a specified sum as proof as a matter of law that there must have been a compromise."

Likewise in the case of *Marlin* v. *Cardillo*, 95 F. 2d 112 (C. A. D. C. 1938), the vehicle of a consent judgment was used to effectuate the compromise.

Petitioners rely on the 1936 case of *Gallagher* v. *Carol Construction Co.*, 272 N. Y. 127 (5 N. E. 2d 63). The case is clearly inapposite for the reason the court was asked specifically to determine damages on a motion to set aside the verdict as excessive. The only issue before the court was the claimed error of excessiveness of the verdict. Here, in spite of the length of the motion for a new trial, not a single reference is made questioning the amount of the verdict. (A. 97, 98, 99, 100.) The later New York decision of *Bogdanoff* v. *Halper ante* demonstrates that the New York courts correctly limit the application of the *Gallagher* case to a situation where it is apparent from the record that the trial judge did, in fact, evaluate damages prior to the entry of the remittitur order. The courts in various jurisdictions are in accord that a compromise given effect through any type of agreed order of court will bar any future claim for compensation if such disposition is achieved without the written consent of the employer. (*Utilities Insurance Company* v. *McBride*, 315 F. 2d 553, 556 (C. A. 10, 1963); *Commissioners of Taxation and Finance* v. *General Electric Company*, 105 N. Y. S. 2d 929 (1959); *Cristiano* v. *Ninfa's Restaurant*, 139 N. Y. S.

2d 543 (1955); *Kirby* v. *Bloomingdale Brothers,* 10 N. Y. S. 2d 443 Affirmed, 281 N. Y. 856, 24 N. E. 2d 499 (1939); *Duffy* v. *Fuller,* 250 N. Y. S. 2d 108 (1964).

The cited decisions of this court in *Arkansas Cattle Co.* v. *Mann,* 130 U. S. 69, 73-74 (1888); and *Northern Pacific Railroad Co.* v. *Herbert,* 116 U. S. 642, 646-647 (1885), demonstrate only that an order of remittitur *may* be the result of a judicial determination of the issue of damages. In each case the trial court which entered the remittitur order had before it and was requested to reverse or order a new trial because damages awarded were excessive.

In *Northern Pacific Railroad Co.* a motion for a new trial was made on various grounds chief of which was that the damages were excessive. The court evaluated the damage elements or evidence in the trial and directed the remittitur. In *Arkansas Cattle* v. *Mann,* 130 U. S. 69 (1888), this court commented on the fact that the trial court had been asked to evaluate the damages and had the elements or evidence as to damages beforehand. That action is no different than occurred in the case of *Gallagher* v. *Carol Construction Co.,* 272 N. Y. 127, 5 N. E. 2d 63 (1936) which is clearly distinguishable from the facts of this case wherein the damage issue was not before the court on the motion for a new trial. The court on the motion made no ascertainment on the damage issue, he did not observe or investigate the issue as there was never any dispute that the damages were at least $30,000, if there was liability. Therefore, there was no judicial determination of damages. Although it is apparent the issue of damages was not before the court, there was nonetheless a disposition of the claim which was completed without appeal or objection by either party which necessarily establishes that there was an abatement of extreme positions, a mutual agreement by concessions, a compromise. Webster's New Unabridged Dictionary defines compromise as:

"Compromise, n. The mutual promise to abide by the decision of an arbiter. 1) A mutual agreement to refer matters in dispute to the decision of Arbitrators. 2) A settlement by arbitration or by consent reached by mutual concessions; a reciprocal abatement of extreme demands or rights, resulting in an agreement; composition. * * *

"v.t. 1) To adjust and settle (a difference) between parties; 2) To bind by mutual agreement; 3) To adjust and settle by mutual concessions; to adjust and settle by compromise * * *"

"v.i. 1) To come to agreement by concession. 2) To make a practical adjustment of rival courses, opinions or principles, by partial concessions."

The definition establishes that even if the parties engaged the good offices of the court to assist in reaching a dollar settlement of the liability issues, that resolution is still within the dictionary definition of compromise and as that disposition was effected without the written consent of the employer, the compensation action is barred. (33 U. S. C. 933(g).)

There has never been a determination in this case as to whether the conduct of the parties constituted a compromise. The Commissioner said it was a question of law and he would not rule upon it. The District Court simply adopted the finding of the Commissioner which made no reference to this issue and the Court of Appeals did not reach the issue because of their holding that the doctrine of res judicata applied.

In spite of the fact that the knowledge of all the circumstances which surrounded the disposition of the negligence action without the employer's signature, was in the control of the petitioners and was not produced, it is suggested that the employer must show prejudice. Not only is prejudice presumed, *Marlin* v. *Cardillo*, C. A. D. C., 95 F. 2d 112 (1938), but the prejudice is apparent in the accept-

ance of $11,000 less than the jury verdict. Prejudice here can also be shown by the fact that when the negligence action was first filed a $100,000 *ad damnum* was prayed. On motion the court reduced it to a maximum of $30,000 upon a ruling that the recovery was limited to the maximum amount permitted by the Illinois Wrongful Death Statute. An active legal controversy existed at that time as to the propriety and constitutionality of the $30,000 wrongful death limitation of the Illinois statute. Since that time, the Illinois Supreme Court has ruled that the $30,000 limitation does not apply to certain statutory actions, *Li Petri* v. *Turner Construction,* 36 Ill. 2d 597, 601 (1967), the limitation has been removed prospectively in all cases by action of the 1967 Illinois General Assembly and the general constitutionality of the limitation is under constitutional attack in the pending case of *Butler* v. *Chicago Transit Authority,* Docket No. 40369. S. C. of Ill.

If the case of *Banks* v. *Norris Grain* had not been settled, it could have been pursued with a possible unlimited recovery which, if accomplished, would have relieved respondents of any possibility of a deficiency compensation award. This possibility for the reasons just cited is not fanciful, but a real possibility which was irrevocably thwarted by petitioners' compromise settlement without the written consent of the employer. The statute permits the injured employee or his dependents in a third party action to control that action, but with cognizance of the employer's right. The employer's rights here were ignored and the statutory penalty is clear. The subsequent compensation action is barred.

The cases cited on page 26 by petitioners do not hold that substantial prejudice must be shown, but rather show as in *Chapman* v. *Hoage,* 296 U. S. 532 (1935), that the dismissal of an action which has been established as without merit did not constitute a compromise so as to the bar the

January 30 and, further, that he subsequently struck his head against a concrete floor in his own home which blow caused severe injuries that brought about death on February 12, 1961. To the question as to whether there might or could be a causal relationship between the rope incident and the fall at home, the doctor gave a "yes" answer. (A. 44.) In determining whether that answer is substantial evidence to prove the fact, the reviewing court must take into account whatever fairly detracts from the "yes" answer. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 487. In this case, the same witness also gave a "no" answer. (A. 54, 55.)

Not only does the "no" answer detract from the substantiality of the "yes" answer, but it is of greater weight and of greater substance as the "no" answer was given after the Deputy Commissioner clarified for the witness the evidence and the contents of the hypothetical question. (A. 54.)

It was first demonstrated that the "yes" answer was given because the doctor assumed two facts which were not in the question. The doctor assumed prior good health, while, in fact, Mrs. Banks admitted that when she previously testified before the Commissioner in the first trial concerning the death of her husband, she stated under oath that in the 3 days prior to January 30, he had complained of headaches. (A. 33.) He complained of lightheadedness and that it was impossible to hold a conversation with him because he would not answer a question. (A. 78, 80.) The doctor also assumed that the man had fallen forward onto the steps immediately below him. (A. 51.) When the actual facts in evidence were given to him by the Deputy Commissioner, he said no, emphatically no, the incident at work could not have caused that type of fall. (A. 54, 55.)

The retraction of the single bit of evidence establishing a causal connection is seen by the following testimony given before the Deputy Commissioner:

"Deputy Commissioner Enos: The testimony is that this gentleman came to the top of the stairs and he pitched forward, and went down the stairs, not touching the stairs with any part of his body; that he fell, struck his head on the concrete floor below. I would like to know whether or not from a medical standpoint that sort of thing is practical?

The Witness: It's impractical. It's impossible not to touch the steps, because the hypothetical describes two walls, so he couldn't fall down the stairwell. He had to fall forward down the continuity of steps.

Q. There was a set of 11 steps there.

A. He would have to fall forward.

Q. The testimony is that he pitched forward down those steps and no part of his body touched those steps as he went down.

A. *I do not see how that is possible, unless as I told Mr. Braun, he took a running start.* To clear the steps would be—if the step was 10 inches, 110 inches, it would almost be 10 feet.

Q. Do you know of any medical—anything in the medical literature that would account for anything like that?

A. No, sir. He couldn't clear 10 feet. It is approximately 10 feet. I just figured it out, 11 steps, and if he is falling down like this (indicating), if he is falling even just like this (indicating), as he fell *he has to fall on the steps.* Ten feet is a respectable broad jump. Here is 10 feet, from here (indicating) to here.

Q. You could not explain that from a medical standpoint how a man could pitch forward and clear the entire steps, land on his—

A. There are some rare diseases, like tetanus, certain poisons, where the muscles go into tremendous contractions, and in fact that is what kills the patient.

Q. You did testify, did you not, Doctor, that in your

opinion the cause of this man falling was loss of consciousness by reason of an acute subdural hematoma?

A. I did, yes, sir.

Q. What would be the natural reaction?

A. Just a fall—

Q. Would he have a tendency to slump?

A. He could slump.

Q. And tumble down the stairs?

A. Yes, he could.

Q. I presume if he was unconscious when he started, that that would account for the fact that he did not use his arms to protect himself in any way going down?

A. That is a proper assumption. He could fall straight. He wouldn't of necessity have to slump down into a huddle. He could fall straight down and continue falling, *but he would have to hit the steps.*" (A. 54, 55.) (Emphasis ours.)

Knowledge of what happened in the Banks' home on January 30, 1961 was solely in the possession of Mrs. Banks and her children, the compensation applicants. Mrs. Banks testified in both hearings before the Deputy Commissioner that John Banks did not fall onto the steps; that his body did not strike any of the steps but was projected over all of the steps to the concrete floor below. (A. 33, 79, 80.) Their sole causal connection witness, Dr. Spiegel, was of the opinion the man had an acute subdural hematoma that caused sudden unconsciousness. He insisted, however, that sudden unconsciousness from an acute subdural hematoma could not project a person over an entire flight of 11 steps. The condition he thought was present in his opinion would cause a person to slump to the floor or fall onto the steps immediately below. It could not cause him to be projected over all the steps as was the uncontradicted evidence by the only person to witness the fall at home.

The action of the Commissioner here in accepting the

first comment of the doctor and ignoring the subsequent retraction of that opinion is much like the situation in *Colonna's Shipyard* v. *O'Hearne,* 200 F. 2d 220 C. A. 4 (1952). There, the treating physician stated that when he first saw the patient, he felt the condition was related to his work. This first impression, however, was proved to be erroneous by subsequent medical tests and surgery. He then said there was no connection. The Commissioner nonetheless accepted the first and awarded compensation. In reversing the Deputy Commissioner, the court stated at p. 223:

> "* * * the judgment must be reversed, because the findings of the Deputy Commissioner are not supported by substantial evidence on the record considered as a whole."

The practice of viewing certain evidence tending to support a favored position and viewing that evidence in isolation apparently was not an uncommon practice by certain administrative agencies prior to 1946. In the case of *Universal Camera Corporation* v. *National Labor Relations Board,* 340 U. S. 474 (1951), the court referred to that evil and commented that Congress specifically intended to correct the situation by inserting in the Act of 1946 the words "the court shall review the whole record", and stated at p. 487 that:

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account the contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. * * *"

compensation claim. In *Weyerhaeuser Timber Co., et al.* v. *Marshall,* C. A. 9, 102 F. 2d 78 (1939), a collateral action had determined that no cause of action existed for the recovery of damages. The dismissal therefore of a worthless action did not constitute a compromise. In *Candado Stevedoring Co.* v. *Lowe,* C. A. 2, 85 F. 2d 119 (1960), the third party action in fact had been transferred to the employer within the period of limitations by the employee's filing with the Commission. He, therefore, had not compromised it and the employer still had his right of subrogation.

Likewise *Bell* v. *O'Hearne,* C. A. 4, 284 F. 2d 781 (1960), in no way affects the issue. Here there is an actual compromise and clear actual prejudice to the employer, there the settlement after verdict was held not a compromise only because the full amount of the verdict was credited to the employer.

C. THE FINDING OF A RELATIONSHIP BETWEEN FATAL INJURIES SUSTAINED AT HOME AND THE DECEDENT'S EMPLOYMENT IS A FINDING UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND MUST THEREFORE BE SET ASIDE.

The respondents present this issue not unmindful that this Court has held that this is not the place to review a conflict of evidence nor to reverse a Court of Appeals solely on fact issues which are of importance to the immediate litigants only. It is also recognized that it is the function of the Deputy Commissioner to draw inferences and conclusions of fact from the evidence presented and that such inferences are binding upon courts of review if not contrary to law and supported by substantial evidence. The respondents here contend that the finding of a relationship between the decedent's work and the fatal injuries is not supported by substantial evidence as required by law. The decision below precluded judicial review of the issue of substantiality.

At the second trial before the Deputy Commissioner 2 witnesses were presented to establish the occurrence of an accident. The first, McAndrews, said that he saw a rope fall about John Banks on the last day he worked and that this was in the Fall of the year. (A. 29.) John Banks died on February 12, 1961. The witness upon which petitioners rely was Michael Miramontez who testified that he worked with John Banks on January 30 and as they worked a rope was stretched from a hold in a barge to a point approximately 50 feet above and behind John Banks. This rope broke and as it fell coiled into a ball and landed on the head of John Banks. It remained in this position, even as he leaned forward over a hatch cover. (A. 26, 27.)

The respondents here contend that even if it is assumed that the rope fell precisely as witness Miramontez said, this record does not contain substantial credible evidence to support a fact finding that there is a relationship between that incident and the fall at home some 2½ hours later.

The determination of that essential fact issue necessarily requires the application and understanding of scientific medical knowledge as there is no obvious chain of events or symptoms bridging the time period. During the interval between the alleged incident and the fall at home, Mr. Banks drank beer in a local tavern with co-workers and visited with his wife; there was no complaint by him and there was no exterior symptom of injury of any kind.

Respondents contend that the single witness to establish the causal connection did not give credible proof, but rather directly contradicted himself on the issue and otherwise was impeached. His testimony is not substantial by any standard. Dr. Spiegel was given a hypothetical question incorporating as fact that a quantity of rope weighing approximately 20 pounds had fallen on the head of John Banks at approximately 2:00 to 2:30 PM on

Further detracting from the weight of the testimony of Dr. Spiegel is conflict between his opinion of what caused Mr. Banks to become unconscious at home and the opinion of his partner, Dr. Tinsley, who actually attended Mr. Banks at the hospital. Dr. Spiegel said it was an acute subdural hematoma. (A. 45, 54.) Dr. Tinsley and the family doctor signed the hospital record certifying that the diagnosis was alcoholism with a CVA (cerebral vascular accident). (A. 49, 50.) In *Backstrom* v. *Turner Construction Company, et al.*, 132 N. Y. S. 2d 126 (1954), a conflict between the opinion of a nontreating but testifying physician with the opinion of the treating physician was found to render the nontreating physician's opinion insubstantial to a sufficient degree to require the reversal of an award by the Commissioner. In that case, the conflict existed between attending physicians, including the surgeon and the opinion of a physician who never saw the decedent and whose opinion was based, in part, on mistaken fact. In this case, Dr. Spiegel did see the decedent once but his opinion was also based in part upon mistaken facts. In the *Backstrom* case, the court said at p. 127:

> "Such a state of the record does not satisfy the substantial evidence rule, and when the record is considered as a whole, there is no substantial evidence to support the award."

In this case when Dr. Spiegel was asked about the contrary opinion of the treating family doctor that the man's condition was the result of alcoholism with cerebral vascular accident, he simply stated: "Well, he has the same right to error as has my partner." (A. 50.)

Not only is there a difference between Dr. Spiegel and the treating physician as to what pathological condition existed, but Dr. Spiegel directly contradicted his own prior sworn testimony.

When Dr. Spiegel testified in the negligence action in the Federal District Court in May of 1963, he said John Banks had a chronic subdural hematoma, not an acute subdural hematoma. In the Federal Court he testified as follows:

> "Q. So you would say that he *did not have an acute subdural episode?*"
>
> "A. No, he didn't.
>
> "Q. You are saying that the kind of subdural hematoma that he had was a chronic one?
>
> "A. He eventually died from that. Yes." (A. 48.)

He agreed that the hypothetical question in this case was virtually the same as the one given to him in the Federal District Court. (A. 48.) In this case he testified as follows:

The Commissioner.

> "Q. You did testify, did you not, doctor, that, in your opinion, the cause of this man falling was a loss of consciousness by reason of an acute subdural hematoma?
>
> "A. I did, yes sir." (A. 55.)

The opinion of the sole causal connection witness in this case is, therefore, seen to be directly contradictory to his prior sworn testimony in the District Court. There man had a chronic subdural hematoma, which is slight bleeding and enlarges by an osmotic process. (A. 45.) In this case, he said the same man had an acute subdural hematoma, one of the deadliest lesions known which kills in hours (A. 45, 86), and in which there is no osmotic process. (A. 51.) Dr. Spiegel was also willing to assign whatever cause is presented as the direct cause of the fall at home. In the first hearing he said it was an incident at work on January 26 that caused the man to fall on January 30. In the second hearing, it was an alleged incident occurring only 2 hours before the fatal fall at home on January 30, 1961.

Standing alone, the testimony of applicant's sole causal connection witness does not constitute substantial evidence to carry the burden of proof. The "no" answer to the hypothetical question given by the doctor to the Commissioner in and of itself negates the previous "yes" answer and renders the record without proof of a relationship between the employment and the fatal fall at home.

Dr. Oldberg consistently testified in each case that all significant findings upon admission to the hospital and all findings upon autopsy were consistent with the trauma on the concrete floor in decedent's home. (A. 63, 88.) It was far beyond the realm of medical certainty for the alleged incident at work to be an inciting or etiological part in the subsequent development. People don't get subdural hematomas and go on normally for 4 or 5 days and suddenly lose consciousness. (A. 89.)

Even if it were assumed that he had been struck on the head on January 30 by a quantity of rope, there is no way medically that you could connect anything that could have happened two hours before that would give a latent period of complete well being and then a sudden catastrophic thing that precipitated him down the flight of stairs. There is nothing that Dr. Oldberg knew of as far as the mechanism of the brain was concerned that could produce that result. (A. 63.) If there had been brain damage from a trauma to the head, there would be a march of events that might have ended in unconsciousness, but there is no reasonable ground to explain why a couple of hours after a trauma, the individual would instantaneously lose consciousness. That simply does not happen in his experience and there is no connection between the two from a medical standpoint. (A. 63.)

The standard of the Administrative Procedure Act applicable to the Longshoremen's and Harbor Workers' Com-

pensation Act requires that the finding of the Commissioner be set aside if unsupported by substantial evidence and that such determination shall take into consideration the whole record. (5 U. S. C. 1009(g).)

This Court has described the function of the courts under that provision in *Universal Camera Co.* v. *National Labor Relations Board,* 340 U. S. 474 (1951), p. 490:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of labor board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibilities for assuring that the Board keeps within reasonable grounds. * * *"

And further at page 488:

> "Congress has made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscienciously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

Respondents respectfully request that as the Court of Appeals did not reach the issue of substantiality, that this Court set aside the finding of causal relationship as not being supported by substantial evidence and thus insure that the standard of the statute be honored and the function of the courts of review be fulfilled.

The purpose and intention of the statute requiring substantial evidence is clear. Without enforcement by this court, it is a nullity.

CONCLUSION.

The respondents respectfully request that this Court affirm the judgment of the Court of Appeals for the reason that the Deputy Commissioner should not have entertained the second claim because it was barred by res judicata and because it was barred by Section 33(g) of the Longshoremen's and Harbor Workers' Compensation Act by virtue of the compromise of a third party action without the approval of the employer and for the further reason that the finding of a causal relationship between the decedent's work and a subsequent fatal fall in his home is a finding that is not supported by substantial evidence as required by law.

Respectfully submitted,

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